IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7199 OF 2005

Ajitkumarsingh Devkumarsingh Kasliwal .. Petitioner

Vs.

M/s.Kuber Builders .. Respondents

Mr.R.A.Thorat for the petitioner

Mr.Dilip Bhatra for the respondents

CORAM : S.U.KAMDAR, J
DATED : 29TH NOVEMBER, 2005

P.C.:

1. By the impugned order dt.25.8.05 the learned Judge of City Civil Court at Bombay had directed the party to lead evidence in support of contention at the interlocutory stage of hearing of notice of motion.

2. Undoubtedly, there is a power in the court in appropriate case which is a rarest of rare case in which the parties may be asked to lead evidence at interlocutory stage. I am however, of the opinion that in the facts of the present case the matter can be determined and decided on the basis

of affidavit at an interlocutory stage.

3. Normally interim applications are not heard on the basis of oral evidence. If the petitioner fails to establish a prima facie case on the basis of affidavits then his motion is required to be dismissed and cannot be considered by leading oral evidence. There is a distinction between a trial of the suit and the hearing at the interlocutory stage. Thus, exercise at both stages cannot be permitted to be the same.

4. Apart therefrom, it is now well settled that even at the hearing of the suit under Order 18 of the Civil Procedure Code parties may lead evidence and the court has no power to force any person to lead evidence. If he fails to lead evidence and prove his case then the suit is required to be dismissed. However, in the impugned order, at the interim stage the learned Judge has directed parties to lead oral evidence which is ex-facie not permissible.

5. In that view of the matter, the impugned

order is unsustainable in law and thus, same is set aside and Notice of Motion No.1350 of 2005 is remanded back to the trial court for afresh determination on affidavits already filed by the parties. Motion to be disposed of by the trial court on or before before 31.12.05. Writ Petition disposed of accordingly. No order as to costs.